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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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**No. [redacted] 63**

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THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

*Petitioners,*

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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# No. 915

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THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

*Petitioners,*

*vs.*

THE UNITED STATES,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Northwestern Bands of Shoshone Indians, by their attorneys, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above cause on January 3, 1944.

### Opinions Below.

The first opinion of the Court of Claims is reported in 95 C. Cls. 642, and appears at R. 26; the second opinion is as yet unreported, but appears at R. 77.

## Jurisdiction.

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The jurisdiction of this Court is invoked under § 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, and the Act of February 28, 1929, c. 377, 45 Stat. 1407, § 4, Appendix, *post*, the latter being the special jurisdictional act under which this suit was instituted in the court below.[1] The time within which this petition could be filed was extended for 60 days from April 3, 1944, by the Chief Justice of the Supreme Court on March 13, 1944 (R. 115).

## Questions Presented.

1. Whether the word "claim" as used in Indian treaties in its various inflections and tenses is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. Whether the United States acknowledged or "recognized" petitioners' Indian title by the treaty of July 30, 1863, 13 Stat. 663, and related treaties,[2] to the lands described and claimed by petitioners therein.

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[1] The special jurisdictional act provides, *op cit.*, that from the decision below "an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States." Notwithstanding this statute was enacted subsequent to the Act of February 13, 1925, cited in the text, it is believed that certiorari and not appeal is the proper mode of review. See ROBERTSON & KIRKHAM, *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47, citing *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U. S. 244, 245-6.

[2] Treaty of July 2, 1863 with the Eastern Shoshones, 18 Stat. 685 (R. 51); Treaty of October 1, 1863, with the Western Shoshones, 18 Stat. 689 (R. 55); Treaty of October 12, 1863, with the Shoshonee-Goship Bands, 13 Stat. 681 (R. 22); Treaty of October 14, 1863, with the Mixed Bands of Bannocks and Shoshonees, 5 Kappler 693 (R. 60).

Stated more in detail this question is that of whether petitioners' title was not acknowledged or "recognized" by the provisions of such treaties wherein,

(a) the boundaries of the land "claimed" by one of petitioner bands are specifically described in petitioners' treaty, and the boundaries of the land claimed by all of petitioner bands can be determined by reference to all of the Shoshone treaties, of which petitioners' treaty is a part;

(b) petitioner Indians (1) agreed that routes of travel through "Shoshone country" should remain free and safe for white travel, (2) consented to the establishment of military agricultural settlements and military posts along said routes, to ferries being maintained over rivers required in such country, to the erection of houses and settlements at such points in such country "as may be necessary for the comfort and convenience of travellers", to the operation and maintenance of "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country" and (3) granted the right to construct a transcontinental railway "through any portion of the country claimed by them";

(c) it was provided (through an amendment added by the Senate and accepted by petitioner Indians) that nothing contained in the treaty should "be construed or taken to admit any other or greater title or interest in the lands" than existed in petitioner Indians upon the acquisition of such lands by the United States from Mexico (part of their lands having been embraced in the territory acquired from Mexico under the treaty of Guadalupe Hidalgo).

3. Whether, in any event, the United States by entering into a treaty as to lands with an Indian tribe acknowledged or "recognized" the Indian title of Indians to such of the claimed lands as was actually used and occupied by them at the time of the treaty.

4. Whether the policy of the United States has been opposed to the acknowledgment or "recognition" of the Indian title to lands within the territory acquired by the United States from Mexico.

## Treaties and Statutes Involved.

The treaties are quoted in full in the record (R. 40-51). The statutes involved are set forth in the appendix, *infra*.

## Nature of Suit.

This suit was brought by the Northwestern Bands of Shoshone Indians, a division of the Shoshone Nation, under a special jurisdictional act (c. 377, 45 Stat. 1407, quoted in the appendix) which authorized the Court of Claims to render judgment on "any and all claims * * * arising under or growing out of the treaty of July 2, 1863 * * *; treaty of July 30, 1863, * * * and any subsequent treaty Act of Congress, or Executive order * * *" to recover the value of certain lands lying in southern Idaho, northern Utah, and, to a small extent, in the northeast corner of Nevada. Petitioners contend that these lands were taken by the United States for its own use without petitioners' consent. The lands lying in Utah and Nevada were a part of the territory acquired by the United States from Mexico in 1848 by the treaty of Guadalupe Hidalgo. Sovereignty over the lands lying in Idaho was confirmed and conceded by the Oregon Treaty of June 15, 1846 with Great Britain (9 Stat. 869).

The case was heard by the court below without a commissioner, the court making its own findings of fact and conclusions of law. There has been no review of those findings or conclusions.[3]

[3] The practice in the ordinary case in the Court of Claims is for the case to be referred to a commissioner, who conducts a trial and makes findings of fact. On exceptions being taken to these findings, the case

## Statement of Facts—Fort Laramie Treaty

As early as 1849, Indian agents and superintendents recommended that the United States negotiate treaties with the Shoshone Indians which would establish peace and friendship between them and the whites, and secure for the whites the right to traverse Shoshone country.[4] In 1851 a delegation of 60 Shoshone chiefs and headmen were invited and taken to Fort Laramie, Wyoming, where they attended a treaty council to negotiate a treaty with the United States. In addition to the Shoshone Nation the Fort Berthold (Gros Ventres, Arrickarees, and Mandans), Sioux, Cheyenne, Arapahoe, Crow, and Assiniboine tribes of Indians were present. The United States Commissioners attending the council, however, were in doubt as to whether their instructions authorized the inclusion of the Shoshone Nation.[5] Consequently the treaty which was concluded at Fort Laramie[6] did not include the Shoshone Nation, but did include the other tribes above named.

Certain of the lands described in the Fort Laramie treaty were later taken by the United States, as a result of which the Indian tribes concerned recovered judgments against the United States on the ground that such treaty

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is then argued in its entirety to the full bench. In this sense the Court of Claims reviews the findings of the commissioner (or acts as an appeal court) In Indian tribal suits, however, the usual practice is not to appoint a commissioner. Rather, oral testimony, if any, is taken before a notary public and calls are made on the departments of the government for pertinent records. The parties then "brief" the case, after which argument on the merits of the case is had before the full bench. This is denominated the "trial" of the case. By this practice, the court, instead of reviewing the findings made by the commissioner, makes its own findings. Under such procedure there is no review of the findings unless certiorari is granted by this Court.

[4] Ann. Rep. Commr. Ind. Affs. 1849, pp. 67-68.

[5] Ann. Rep. Commr. Ind. Affairs, 1851, Exec. Doc. No. 2, 32d Cong., 1st Sess., p. 445.

[6] 4 Kappler 1065

acknowledged and recognized their title to such lands. (*Fort Berthold Indians* v. *United States,* 71 C. Cls. 308, 331, 333; *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied 292 U. S. 606; *Crow Nation* v. *United States,* 81 C. Cls. 238.)

The petitioners contend that the Fort Laramie treaty is indistinguishable in legal effect from the Shoshone treaties here sued upon, and that petitioners should therefore recover on the authority of the cases above cited for lands described in the Shoshone treaties and taken without their consent.

**Shoshone Treaties.**

Prior to the negotiation of the Shoshone treaties here sued upon the Surveyor General of the Territory of Utah, in which the plaintiffs were partially located, urged that before any additional surveys of land were undertaken, the "*Indian title*" should be extinguished.[7] In 1861 the Commissioner of Indian Affairs recommended that a treaty be negotiated with the Shoshone Indians which would grant to them "annuities in consideration of a right-of-way across their country."[8] In the same year, Henry Martin, then Superintendent of Indian Affairs for the territory of Utah (later one of the treaty commissioners), recommended negotiation of a treaty whereby the Shoshones would "cede to the United States *all the lands they claim,*" except certain reservations (R. 31). On September 12, 1862, James Duane Doty, then Superintendent of Indian Affairs for the territory of Utah (later the main treaty commissioner), in his annual report expressly recommended "that treaties be entered into with all of these tribes [Shoshones and

[7] Letter of October 6, 1859, from S. C. Stambaugh, Surveyor General of the Territory of Utah, to Commissioner of General Land Office, Ann. Rep. Commr. G. L. O. 1859, pp. 199-204.

[8] Ann. Rep. Commr. Ind. Affs. 1861, p. 25 (p. 642 in Report of Secretary of the Interior for 1861).

Bannocks] to *extinguish their right of occupancy.*"[9] Congress authorized the appointment of a treaty commission (Act of July 5, 1862, 12 Stat. 512, 529) but did not provide for the extinguishment of the Indian title to Shoshone land (R. 32). Acting under this statute, the Commissioner of Indian Affairs instructed the special commission appointed to carry into effect the object of Congress, *inter alia* (R. 34):

> "*It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land,* but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable." (Italics added.)

The commissioners, finding it impossible to assemble the entire Shoshone Nation together at one time (R. 39) met separately with each of its five divisions, between July 2d and October 14th, 1863 (R. 39). They met first with the Eastern Shoshones at Ft. Bridger, Wyoming, where they negotiated the treaty of July 2, 1863, 18 Stat. 685 (R. 40). This treaty set forth the northern, eastern, and southern boundaries of the Shoshone country, as defined and described by said nation (Art. IV, R. 41), but left the "western boundary • • • undefined" since there were "no

[9] Ann. Rep. Commr. Ind. Affs. 1862, p. 199.

Shoshonees from that district of country present." It also provided that a "firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States"; the Shoshones agreed that routes of travel through "Shoshonee country" should remain free and safe for white travel; and that the United States *may* establish military agricultural settlements and military posts along said routes, maintain ferries over rivers wherever required, and erect houses and settlements at such points in such country "as may be necessary for the comfort and convenience of travellers" (Art. II, R. 40), operate and maintain "telegraph and overland stage lines" which were already "operated through a part of Shoshonee country", and operate a continental railway "through any portion of the country claimed by" the Shoshonees.

On July 30, 1863, the commissioners met with petitioners, and concluded a treaty (13 Stat. 663) at Box Elder, Utah. This treaty, by Article II, incorporated by express reference and adoption all the provisions of the Ft. Bridger treaty. The petitioner Indians thereby granted the same rights of way and easements over their land as were granted by the Eastern Shoshones. The Box Elder treaty did not purport to describe the land of all the Northwestern Shoshone bands but did describe the "country claimed by Pokatello [a chief of petitioner Indians] for himself and his people," bounded on the west by Raft River and on the east by Porteneuf Mountains.

Like treaties were entered into with the Western Shoshones on October 1, 1863 (18 Stat. 689), the Shoshonee-Goship Bands on October 12, 1863 (13 Stat. 681), and the Mixed Bands of Bannacks and Shoshonees on October 14, 1863 (5 Kappler 693), which together constitute the entire Shoshone Nation. The successive treaties either repeated substantially the undertakings of the Ft. Bridger treaty

or incorporated it and the intervening treaties by reference.[10] Governor Doty (Chairman of the Shoshones Commission) prepared a map showing the exterior boundaries of the Shoshone Nation and the lines of the country occupied by the five different divisions of the Shoshone Nation, as set forth in the five various treaties (R. 55). This map was attached to the treaties when they were sent to the Senate for ratification (R. 57, 100-101).

Before ratification by the Senate, that body added an amendment to each of the treaties (except the treaty with the Western Shoshones), which expressly provided that nothing therein contained should be construed to admit of any greater title or interest in the lands then existed in the tribe under Mexican law. The petitioners ratified and accepted the Senate amendment (R. 57). In February, 1865, Congress authorized the President to enter into treaties with the tribes of Indians in Utah Territory for the extinction of their possessory right to agricultural and mineral lands and for their segregation on reservations (R. 58-59). A treaty was subsequently (July 3, 1868) negotiated with the Eastern Shoshones by which they gave up the territory claimed by them in the Ft. Bridger Treaty in exchange for other lands. 15 Stat. 673 (R. 59). For the taking of lands secured to them under the latter treaty they recovered in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476; 304 U. S. 111. No further treaty or agreement was ever negotiated or attempted to be made with petitioner bands.

It is uncontradicted that practically all of the land claimed by petitioners, and for which compensation is sought, has been taken and is now possessed by the United States, or by vendees of the latter.

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[10] Northwestern Shoshone Treaty, Art. II, R. 43; Western Shoshone Treaty, Arts. II-III, R. 45; Shoshonee-Goship Treaty, Arts. II-III, R. 48; Mixed Bands Treaty, Art. II, R. 50.

The court below purported to find as a fact that "the United States, in making and ratifying the treaty [of Box Elder], did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto" (R. 58). The court further purported to find as a fact that "the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation,"[11] (R. 58) and concluded that the United States was not liable for the taking of the land described in the Shoshone treaties (R. 62).

Petitioners contend that these "findings" are conclusions of law, plainly at variance with the conclusions which must be drawn from the facts found by the court. To the extent that there was any evidence with respect to these conclusions, they are completely unsupported in the record. That evidence consists entirely of administrative rulings and is wholly to the contrary.

**Specification of Errors to be Urged.**

The Court of Claims erred:

1. In failing to hold that the word "claim", as used in Indian treaties, is a word of art constituting an acknowledgment or "recognition" by the United States of Indian title to the lands respectively described therein.

2. In holding that a treaty of "peace and amity" with an Indian tribe does not constitute an acknowledgment or recognition by the United States of the Indian title of the Indians to the lands they used and occupied.

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[11] The court purported specifically to find that prior to and at the time of the treaty the United States had not recognized any right of exclusive occupancy in plaintiff tribe as against the United States to any territory in the Mexican Cession. (Fdg. 21, R. 58).

3. In holding that the Treaty of July 30, 1863, 13 Stat. 663, and related treaties, did not constitute an acknowledgment or "recognition" of petitioners' title to land.

4. In holding that as to land claimed by Pokatello and his Band, the Treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' title.

5. In making and entering Finding No. 15.

6. In making and entering Finding No. 21.

7. In refusing to admit in evidence Plaintiff's Exhibit 4 filed March 4, 1941.

8. In holding that petitioners are not entitled, under the Treaty of July 30, 1863, and related treaties, to recover for the taking of their lands by respondent.

**Reasons for Granting the Writ.**

The questions presented are of general importance. There are over 50 treaties with Indian tribes in which the word "claim" in its various inflections and tenses in relation to land described therein, is used to denote Indian title (see appendix). The opinion below in the light of the historical meaning attributed to these treaties and the settled decisions of this Court, plainly misconstrues the treaty upon which the suit is founded. A review of the lower court's construction is not foreclosed by the court's making its interpretation in the form of a finding of fact, especially where the only supporting evidence consists of administrative interpretations to the contrary. The court's interpretation fails to read the treaty of petitioners according to the established meaning of the words used; and it ignores the cardinal rule of construction enunciated by this Court that Indian treaties shall be construed liberally in the Indians' behalf, as the Indians would have understood them. It

fails even to follow the rule with respect to international treaties, that where the treaty fairly admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred. It is important that our standard of international justice be so high that we be respected by our dependent Indian nations as to our own conduct and by independent nations as respects the precedents we set for international law. Furthermore, the opinion below conflicts with earlier cases in the Court of Claims as to the effect of similar Indian treaties by which the United States purchased rights of way across Indian lands. The conflict is compelling when the fact is considered that the court below is the only court passing in the first instance on claims of Indian tribes against the United States.

Furthermore, the decision is contrary to the rule laid down by this Court as to the policy of the United States with reference to the Indian title to lands acquired from Mexico. It also fails to observe the accepted rule of international law that even a treaty of "peace and amity"—barring express stipulation to the contrary—between nations necessarily implies a recognition by each of the territorial integrity of, and right to the territory occupied by, the other.

Finally, the court below has sought to exalt the breach sued upon into proof that there was no contract.

1. The opinion below, in the light of settled decisions of this Court, plainly misconstrues the treaty upon which suit is founded.

A. The treaty sets forth, when read with the other treaties of which it is a part, the boundaries of the land claimed by petitioners.[12] The Eastern Shoshone Treaty

[12] This is conveniently shown on the map prepared by the General Land Office lodged with the Clerk of this Court, as an original exhibit (Plaintiff's Exhibit 5), and referred to in the opinion below, R. 74.

(Fdg. 9, 41), incorporated as a part of petitioners' treaty, states that the parties "understood the boundaries of the Shoshone country, as defined and described by said nation" were as described therein. Other treaties of the series used similar expressions (R. 46, 48, 50-51).

This Court—as well as the court below—on the two occasions it had occasion to look at the Eastern Shoshone treaty (Treaty of Ft. Bridger, July 2, 1863, 18 Stat. 685, R. 40) read it as one creating a reservation for that division of the Shoshone Nation. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 485, reversing 82 C. Cls. 23, 26; same case, 304 U. S. 111, 113, reversing 85 C. Cls. 331, 335.[13] While the question was not, in that case, before this Court as now presented, it is significant that as opposed to the narrow reading of the treaty indulged below, this Court read the treaty as one acknowledging the territorial rights of the Indians.

Apart from incorporating the provisions of the Eastern Shoshone treaty, the Northwestern Shoshone treaty expressly provided:

> "*Article* IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains."

The word "claim" as used in Indian treaties, is a word of art which means Indian title. It has been so used throughout the treaties of respondent with its Indian wards, dozens of which treaties are listed in the appendix. Historically in our frontier country it sprang up as the symbol by which Indian title was known, in the same way as it

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[13] In the latter case this Court stated, *op. cit.*, "The findings show: The United States, by the treaty of July 2, 1863, set apart for the Shoshone Tribe a reservation • • • " The reference in the earlier case is similar, pointing out that the *reservation* (set apart by the 1863 treaty) was ceded by the later Treaty of July 3, 1868, 15 Stat. 619, directly in suit in the cases cited.

denominated the title of a miner to his property or as the word "fee" came to denominate a certain title in Anglo-Saxon law. (See Appendix.) It was so used in the present case. Certainly no treaty was needed for the mere purpose of petitioners *asserting* their claims; they had already done that. The court below, however, restricts the meaning of the word to that of an unrecognized assertion or pretension of a right. Counsel have found no instance in any other case where such word in an Indian treaty has been so restrictively used or interpreted.

B. Review of the lower court's interpretation of the treaty sued upon is not foreclosed by its purported finding as a "fact" (Fdg. 15, R. 55; Fdg. 21, R. 58) that the treaties with the Shoshones did not acknowledge any right or title to the Indians to their territory. This is not a "fact" to be found by the court below, but a conclusion of law.[17]

To the extent that there was any evidence before the court below of facts which might bear upon this question of interpretation, all the facts show that an acknowledgment by the treaty of petitioners' title to their lands was intended.[18] Thus the commissioners who negotiated the Shoshone Treaties were specifically instructed *not* to negotiate the treaty "with a view to the extinguishment of the Indian title to the land" (Fdg. 6 at R. 34). They were also instructed to obtain from the Shoshones "a definite acknowledgment • • • of the boundaries of the entire country they claim" and "of the limits within which they will confine themselves" (Fdg. 6 at R. 34).

Administrative officials of the government and the legislative have persistently viewed the Treaty of Box Elder as one establishing petitioners' right to their lands. Thus,

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[17] *Jones* v. *Meehan*, 175 U. S. 1, 32, and cases cited.

[18] Those facts (except facts of which the court below and this Court take judicial notice) have been brought up with the record in this case.

shortly after the treaties with the Shoshones were executed, the Commissioner of Indian Affairs recommended with respect to the Indians in Utah (*Report Commr. Ind. Affs.*, 1863, pp. 37, 38) as follows:

> "* * * I respectfully recommend that measures be taken for the negotiation of further treaties with the Indians, having for their object the *extinguishment of their title to the soil,* and the setting apart of a suitable portion of the public domain upon which they may be concentrated, and so provided for that they need not be compelled to resort to plunder in order to sustain life." (Italics added.)

Congress, by Act of February 23, 1865, 13 Stat. 432, authorized the President to enter into treaties with the various tribes of Indians in Utah Territory to provide "for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians" (Fdg. 22, R. 58-59). However, no treaty pursuant to this authority was entered into with petitioners, but only with the Eastern Shoshones (Fdg. 23, R. 59).

The Secretary of Interior in his report to the Attorney General on this case, which report was filed as evidence by the defendant, states that the territory of the Shoshones "was recognized by the United States as belonging to the various bands of Shoshone Indians by the treaties of July 2, 1863 (18 Stat. L., 685), July 30, 1863 (13 Stat. L., 663), October 1, 1863 (18 Stat. L., 689), and July 3, 1868 (15 Stat. L., 673)" (R. 84); again (R. 92) the "Government recognized all the land as belonging to the Northwestern bands of Shoshones." The Commissioner of the General Land Office in reporting to the Secretary of Interior referred to the land described in the Box Elder treaty as the "land in

the States of Utah and Nevada within the boundaries of the Shoshoni Indian Reservation (Northwestern Band), Treaty of July 30, 1863 (13 Stat. 663)" (R. 98).

C. Despite the protestations of the court below to the contrary (R. 75),[14] it is obvious that this restricted interpretation is contrary to this Court's direction that in the interpretation of an Indian treaty the words must be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians" (*Jones* v. *Meehan*, 175 U. S. 1, 11-12); not "narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them" (*United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, 116). "To contend that the word 'allotted,' in reference to the lands guarantied to the Indians in certain treaties, indicates a favour conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." McLean, J., in *Worcester* v. *Georgia*, 6 Pet. 515, 582.[15]

Even as to international agreements the traditional view of American statesmen and jurists is that once we accept a treaty we are too self-respecting a nation to construe it

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[14] "The lady protests too much, methinks." Hamlet, Act iii, scene 2.

[15] *Kansas Indians*, 5 Wall. 737, 760. *United States* v. *Winans*, 198 U. S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, 198; *Marlin* v. *Lewallen*, 276 U. S. 58, 64; *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 366-367; *United States* v. *Payne*, 264 U. S. 446, 448-449.

narrowly because we have the power to enforce our decision.[16]

2. The holding of the court below that the treaty of July 30, 1863, did not constitute an acknowledgment or recognition of petitioners' Indian title to the lands enumerated is squarely in conflict with other decisions of that court permitting other tribes to recover for lands taken without tribal consent on the theory that the treaties there involved (substantially identical with the treaty in suit) did acknowledge Indian title. *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347, *appeal dismissed cert. den.*, 292 U. S. 606; *Crow Nation* v. *United States*, 81 C. Cls. 238.

In the *Fort Berthold* case, the Arickarees, Gros Ventres,

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[16] Thus President Wilson in requesting the repeal of the law exempting coastwise American ships from Panama Canal tolls as contrary to a treaty with Great Britain said:

> "• • • We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please • • •" (51 Cong. Rec. 4346).

Senator Elihu Root in debate on the Hay-Pauncefote treaty on May 21, 1914, gave voice to the same theory:

> "• • • Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promisor is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made." (51 Cong. Rec. 8945).

This Court, per Stone J., has couched the same in judicial phraseology, as follows:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred." (*Nielsen* v. *Johnson*, 279 U. S. 47, 51-2.)

See also *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-294; *Asakura* v. *City of Seattle*, 265 U. S. 332, 342.

and Mandans Tribes of Indians sued the United States under a jurisdictional act which permitted the Court to determine the amount "due said tribes from the United States under *any treaties*, agreements, or laws of Congress," etc., for the value of lands taken from said tribes in violation of the treaty of September 17, 1851, 4 Kappler 1065, signed at Fort Laramie, Wyoming. By the terms of that treaty certain tribes of Indians agreed, as in the case at bar, that the United States and its citizens should have the right to establish roads, military and other posts through their country, and secured to the United States and its citizens the right to free passage through the same. Article 5 stipulated that the Indian nations, parties to the treaty, thereby recognized and acknowledged that certain described areas were their respective territories. Although the treaty contained no statement of tribal claim to such land as against the United States, nor any statement of recognition of this tribal ownership by the United States, the court held that the effect of the treaty was to recognize title and treat the lands described therein as reservations for the Indians, and that the United States was liable for any subsequent taking of the land involved. In so deciding, the Court stated:

> "• • • The defendant says the territorial provisions were simply mutual recognition by the Indians of their claims to territory and its segregation by them [as between the tribes signing the treaty], without positive governmental recognition or verification of the same. This contention, as we view it, concedes that when the commissioners approached the Indians their title by right of occupancy to all the territory embraced within the treaty was recognized by the commissioners representing the Government, and that what the treaty did was to segregate the same into individual tribal allotments. In other words, the Government not only recognized the Indian title, never at any time disputing

it, but by solemn treaty following negotiations, expressly agreed that each tribe was to be assured title to the territory set aside for it. *Surely it was not essential to procure by treaty the grant of a perpetual right of way through Indian lands if the Indians did not own the same by right of occupancy.* It is true the lands set aside to each tribe embraced a vast domain. To the plaintiff Indians the treaty segregated territory of about 21,000 square miles and embracing close to 13,000,000 acres of land. With this vast estate, however, the treaty deals, and whether the Government in ratifying the treaty was moved by the then nominal value of somewhat of a wilderness, or concerned in Indian peace at present costs, the fact is that the treaty was ratified in the manner provided by law * * * (p. 332).

* * * * * * *

"The law, for which we need not cite familiar precedents, is that in controversies between the Indians and the Government arising out of doubtful and ambiguous provisions of treaties or contracts they are to be taken most strongly against the Government. The Indians' rights are not to be prejudiced by technical construction or words of doubtful import * * *" (p. 333). (Italics added.)

In *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370-371, appeal dismissed and cert. denied, 292 U. S. 606, the plaintiff tribe brought suit under a similar jurisdictional act (permitting determination of claims arising under or growing out of the same Fort Laramie treaty) for lands described in the treaty and which were subsequently taken by the United States. The court again held for plaintiff, although the amount of offsets precluded any net recovery.

In *Crow Nation* v. *United States*, 81 C. Cls. 238, the court below, under a similar jurisdictional act (permitting suit on "any and all claims arising under or growing out of the treaty of Fort Laramie," etc.), arrived for the third time

at the same result, concluding the treaty "set aside a reservation of some 38 million acres to the Crow Nation" (p. 271).

The Shoshone Treaties of July 2 and July 30, 1863, the ones here sued upon, and the Fort Laramie Treaty of 1851, involved in the *Fort Berthold*, *Assiniboine*, and *Crow* cases, *supra*, were negotiated for precisely the same reasons and to attain the same ends. Abnormal increases in travel and constant trespass over Indian land, had provoked the Indians into the commission of depredations, and in each instance the United States sought by negotiating treaties to pacify them, identify their respective territories, secure the right of free and safe passage through their country, and to compensate them for such easements and for the extinction of game. Moreover, the treaties, in substance, carry the same reciprocal obligations and recognitions. Nevertheless, the court, under substantially identical jurisdictional acts, allowed recovery in the three cited cases, but denied recovery in the case at bar. There is no sound distinction between these cases.

3. The court below has plainly misconstrued both the treaty and the decision of this Court in *The United States as Guardian* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339, as respects the lands derived from Mexico.

The court below took the definite view that the policy of this country, from at least 1852 to 1864, was against acknowledging "any possessory use or occupancy right, title or interest [of Indians within the territory acquired from Mexico] as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner" (R. 71). The court overlooked the fact that the senate would not have added

to petitioners' treaty a proviso (Art. IV) that nothing therein contained should be construed to admit of any greater title or interest in the lands than existed in the tribe under Mexican law if it did not regard the treaty as an acknowledgment of the rights of petitioners in their lands. The supposed policy, announced below, apparently lead the court to ignore the compelling inference from the amendment that, without the amendment all the lands, and with the amendment certainly the lands not acquired from Mexico, were acknowledged as properly belonging to petitioners. *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45, 48; *Geofroy* v. *Riggs*, 133 U. S. 258, 269-270; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Wheaton* v. *Peters*, 8 Pet. 591, 661. But the supposed policy is not and has not been the policy of this government, as was recently determined by this Court in the *Santa Fe* case, *supra* (314 U. S. 339, 345). The decision below in this respect conflicts with the decision of this Court in the *Santa Fe* case.

4. In any event the court below failed to note that any treaty necessarily implies a recognition of the territorial integrity of the respective parties, even if it does not contain a delimitation of territory. It is to be remembered that Indian treaties are accorded the same status as international treaties. *The Cherokee Tobacco*, 11 Wall. 616, 621. International law has generally recognized that even a "treaty of peace and friendship" implies acknowledgment of the territorial integrity of the parties; and "The status existing at the time the treaty of peace was signed is, unless a contrary intention is clearly expressed, contemplated by the parties." *Crandall, Treaties, Their Making and Enforcement* (2d ed., 1916), § 159, p. 352. And this is only logical; for a treaty would not be entered into with a party as to whom the United States had no intention of conceding "A local habitation" as well as a name. A party would not

be recognized at all, let alone regarded as capable of contracting a treaty, if it has no lawful abode on this earth.[19] The treaty, therefore, recognizes that petitioners did have some proper home, a domain; and at the least the court below ought to have gone on to consider the lands of which petitioners were lawfully possessed at the time the treaty was entered into.

5. The court below found that "a vast area approximating 80,825,000 acres * * * was exclusively claimed by the Shoshone tribe and Bannock Indians as against other tribes," and that "their possession, occupancy, and use thereof was asserted by them to the exclusion of other tribes of Indians and was thus recognized generally by other separate Indian tribes" (Fdg. 1, R. 27). The court also found that the Eastern Shoshones "were located in the eastern portion of the territory inhabited or occupied by the Indians

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[19] 1 *Hackworth's Dig. Int. L.* §104, p. 725-726, cites the case of *German Continental Gas Co.* v. *Polish State*, IX Recueil des décisions des tribunaux arbitraux mixtes (1929-30), 336 346, translation. There it was urged Poland, though recognized, could not be considered as possessing Warsaw *de jure*, since it had belonged in law to Russia and had not been ceded to Poland. The German-Polish mixed arbitral tribunal, however, ruled:

> "But, whatever may be the importance of delimitation of frontiers, one cannot go so far as to contend that as long as this delimitation has not been juridically decided, the state in question cannot be considered as having any territory whatever. Here, also, the practice of international law and historical precedents indicate the contrary. In order that a state should exist and could be recognized as such with a territory without which it could not either exist or be recognized, it is sufficient that this territory should have a sufficiently certain consistency (even though its frontiers should not have been accurately delimited) and that, on this territory, the state should actually exercise national public authority in an independent manner. There are numerous examples of cases in which states have existed unquestionably, have been recognized and have been recognized mutually at a time when their frontier between them had not yet been accurately fixed. In this connection, it is unnecessary to recall the international arbitrations which have fixed the boundary between the Argentine Republic and Chile and the more recent one between Colombia and Venezuela, and one, could not draw therefrom the conclusion that before these delimitations the states in question had no territory."

of the Shoshone Nation" (Fdg. 9, at R. 42) and that petitioners "inhabited and occupied the territory west of the" Eastern Shoshones (Fdg. 10, R. 43).

The court below, however, denied recovery on the legal theory (Fdg. 21, R. 58) that the United States has ever "exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation".[20] This theory is restated in the opinion below (R. 72-73) as follows: "The record shows and we have found as a fact that the United States has never recognized, either at the time the treaty of July 30 was made, or subsequently, a right of exclusive occupancy in plaintiff bands to the territory claimed by them but that it has ever exercised complete dominion over the territory, and this is one method, or manner, so far as the present authority the court to adjudicate is concerned, or extinguishing the Indian title. *United States, as Guardian* v. *Santa Fe Pacific R. R. Co., supra.*"

There is no basis upon which this so-called finding can be supported. Any theory that Indian title became extinguished *eo instanti* upon the acquisition of the Idaho land from Great Britain and the Utah and Nevada land from Mexico, has been rejected as a matter of law by a long line of decisions of this Court holding that Indian title survived United States ownership.[21] The argument that

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[20] The evidence in the record relied upon to show the exercise of complete dominion and ownership consists of grants of land within the area described in the treaties to railroad companies by Acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356), (R. 98-99), creation of national forest reserves by Presidential proclamations (R. 99), grants to the States of Idaho and Utah for school purposes (R. 100), etc.

[21] *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574; *Worcester* v. *Georgia*, 6 Pet. 515, 547; *Mitchel* v. *United States*, 9 Pet. 711, 734; *Chouteau* v. *Molony*, 16 How. 203, 237; *Holden* v. *Joy*, 17 Wall. 211, 243-4; *United States* v. *Cook*, 19 Wall. 591, 592-3; *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55, 67 *et seq.*; *Cramer* v. *United States*, 261 U. S. 219, 227; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117; *United States, as Guardian* v. *Santa Fe Pac. R. R. Co.*, 314 U. S. 339, 345-6.

because the United States exercised dominion over the lands it must have had no conscious thought of recognizing petitioners' title completely begs the question. The United States cannot by unilateral appropriation of the land either change the meaning of the treaties or destroy the rights of petitioners thereunder. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 496-498; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123.

In this respect the opinion seeks to exalt the breach sued upon into proof that there never was any contract recognizing Indian ownership—an attempt by defendant to profit by its own wrong.

The decision below thus is based on a complete misapprehension as to the nature of tribal rights against the United States. Admitting that the United States can extinguish Indian title at any time, and that without a jurisdictional act the Indians can do nothing to protect themselves, it does not follow that the Indians are helpless when the matter becomes subject to the court's adjudication through waiver of defendant's political immunity by the granting of a jurisdictional act. *Id.* The court below has therefore manifestly misapplied this Court's decision in the *Santa Fe* and other cases.

## Conclusion.

Petitioners seek a determination of their rights under their treaty with the United States in the courts of the United States—one of the parties to the treaty. The question is important not merely to petitioners; but its determination should aid in the solution of other outstanding claims of Indian tribes. The fair and proper determination of the questions is doubly important in this dark hour of history. A scrupulous observance of our treaties with our

conquered Indian tribes, freely interpreted by the highest court of the land with a jealous regard to their complete protection, should go a long way toward convincing a doubting world that a just settlement of grievances on the part of minorities can best be left to democracy.

The writ should be granted.

Respectfully submitted,

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## APPENDIX.

### Statutes Involved

Jurisdictional Act (Act of February 28, 1929, 45 Stat. 1407):

That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685—2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863—2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which

the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a setoff in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

Approved, February 28, 1929.

*Indian Treaties Using the Word "Claim"*

As between whites, the word "claim" has been broadly defined. Thus in *Southern Pac. R. Co.* v. *United States* (N.D. Cal., 1889), 38 Fed. 55, 56, Judge Sawyer stated—"The word 'claim', is very broad and comprehensive in its signification—quite as comprehensive as any of its synonyms—demand, pretension, right, privilege, title."

But in Indian land matters the word "claim" has taken on even a broader connotation. It was there a word of art. In its various inflections and tenses the word "claim" meant none other than Indian title, and was so used throughout the treaties of respondent with its Indian wards. It was there used to denominate the peculiar property of Indians in their land as the word "fee" is used in denominating property of the whites. Thus, where the United States has ceded its own lands to the Indians—in one instance conveying the lands "in fee simple"[22]—it later on in acquiring the lands by recession from the Indians, denominated the title of the Indians merely as a "claim" to the lands.[23] The word "claim" has apparently been regarded as comprehending more than an "interest" in land, as is evident from the contrasting use of these words in a cession by the Sac and Fox Indians to the United States, of "all lands • • • to which they have *any claim*, or

[22] Treaty with the Choctaws, September 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2.

[23] Treaty with the Peorias, Sept. 25, 1818, 7 Stat. 181, 2 Kappler 165, Art. 5, ceding lands to the Peorias, with which compare Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3, in which the Peorias "cede and relinquish to the United States, *all their claims* to land heretofore reserved by, or assigned to them in former treaties • • •."

Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333, 2 Kappler 310, Art. 2, conveying to the Choctaws "in fee simple" certain country west of the Mississippi, with which compare Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706 (preamble, par. 2), wherein the Choctaws relinquished "*all claim*" to a part of the territory.

See also Treaty with the Creeks, Jan. 24, 1826, 7 Stat. 286, 2 Kappler 264, Art. 1, and treaty referred to therein.

title, or in which they have *any interest whatever.*"[24] And the word "claim" has been contrasted with the concept of the court below, in the situation where the Indians cede the lands they "claim" and in addition those to which they "pretend to have any claim."[25] That "claim" means Indian ownership to the Indians is shown by treaties in which the Indians ceded lands "occupied and claimed by them," retaining the right to reside on ground in the ceded area "not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant"[26]—the ownership of the whites thus being described in words the exact equivalent of those used to describe the title of the Indians.

The Indians frequently have ceded their lands in terms of "all their claim";[27] "all claim whatever";[28] "all claim";[29] and "claim of any kind whatsoever."[30] It has been expressed that the Indians were receiving payment for "country claimed by them";[31] or that particular boundaries encompassed land "claimed by them";[32] or that the

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[24] Treaty with Sac and Fox, October 11, 1842, 7 Stat. 596, 2 Kappler 546, Art. 1.

[25] Treaty with the Otoe and Missouri, Sept. 21, 1833, 7 Stat. 429, 2 Kappler 400, Art. 1, in which the language was a cession of lands south of a line "running in a due west line as far west, as said Otes and Missourias, *have, or pretend to have any claim.*"

[26] Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Arts. 1 and 2. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Arts. 1 and 2.

[27] Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278, Art. 1. Treaty with the Kaskaskia and Peoria, Oct. 27, 1832, 7 Stat. 403, 2 Kappler 376, Art. 3.

[28] Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327, 2 Kappler 304.

[29] Treaty with the Seminoles, May 9, 1832, 7 Stat. 368, 2 Kappler 344, Art. 1. Treaty with the Seneca, Nov. 5, 1857, 11 Stat. 735, 12 Stat. 991, 2 Kappler 767, Art. 1.

[30] Treaty with the Potawatomi, June 5 and 17, 1846, 9 Stat. 853, 2 Kappler 557.

[31] Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[32] Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1.

cession was of "all their claim to land" [33] or of "all claim" to certain territory; [34] or that they were conveying "all the country claimed by them." [35]

Thus, too, the cession has been of the lands "claimed and owned," [36] "owned and claimed," [37] or "owned *or* claimed." [38] Sometimes it has been expressed as a cession of lands and country "occupied and claimed," [39] or "occupied *or* claimed." [40] Some treaties recognized, as to Indians not parties to the treaty, that they might have title to some of the lands ceded, by providing that if such bands "residing in and claiming" any portion of the country ceded should not become parties to the treaty, then the consideration should be proportionately adjusted in accordance with the whole number of Indians "residing in and claiming the entire country." [41] The lands are spoken of as being "owned, claimed *or* possessed," [42] "owned, pos-

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[33] Treaty with the Delawares, Oct. 3, 1818, 7 Stat. 188, 2 Kappler 170.

[34] Treaty with the Choctaws and Chickasaws, June 22, 1855, 11 Stat. 611, 2 Kappler 706, preamble.

[35] Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1. Treaty with the Tribes of Middle Oregon, *supra* note 17.

[36] Treaty with the Wea, Oct. 2, 1818, 7 Stat. 186, 2 Kappler 169, Art. 1.

[37] Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, 2 Kappler 685, Art. 1; Treaty with the Chippewa, Red Lake and Pembina Bands, Oct. 2, 1863, 13 Stat. 667, 2 Kappler 853, Art. 2.

[38] Treaty with the Pawnee, Sept. 24, 1857, 11 Stat. 729, 2 Kappler 764, Art. 1; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699, 2 Kappler 756, Art. 5; Treaty with the Ponca, Mar. 12, 1858, 12 Stat. 997, 2 Kappler 772, Art. 1.

[39] Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 1.

[40] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 1; Treaty with the Flatheads, July 16, 1855, 12 Stat. 975, 2 Kappler 722, Art. 1.

[41] Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Arts. 1 and 2; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714, Art. 1.

[42] Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, 2 Kappler 439, Art. 1.

sessed, or claimed,"[43] or "claimed, held, or possesed."[44]

The words of grant themselves have not been limited to the traditional "right, title and interest" of the draftsman of deeds. Thus, the cession has been expressed to be of "all their title and claim,"[45] or "title or claim,"[46] or "all claim or title,"[47] or "all interest or claim,"[48] or "all their right, claim, and title,"[49] or "all their claim, interest and title,"[50] or "all their right, title and claim,"[51] or "all

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[43] Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, 2 Kappler, 776, Art. 1; Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, 12 Stat. 1163, 2 Kappler 807, Art. 1.

[44] Treaty with the Chippewa, Bois Fort Band, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

[45] Treaty with the Choctaw, Oct. 24, 1816, 7 Stat. 152, 2 Kappler 137, Art. 1.

[46] Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237, 2 Kappler 214, Art. 1; Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 2 Kappler 222, Art. 1; Treaty with the Winnebago, Sept. 15, 1832, 7 Stat. 370, 2 Kappler 345, Art. 1; Treaty with the Sac and Fox, Sept. 21, 1832, 7 Stat. 374, 2 Kappler 349, Art. 1.

[47] Treaty with the Chickasaw, Oct. 19, 1818, 7 Stat. 192, 2 Kappler 174, Art. 2; Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224, 2 Kappler 203, Art. 1; Treaty with the Quapaw, Nov. 15, 1824, 7 Stat. 232, 2 Kappler 210, Art. 1.

[48] Treaty with the Iowa, Oct. 19, 1838, 7 Stat. 568, 2 Kappler 518, Art. 1, ¶ 1 (see ¶ 2).

[49] Treaty with the Ottawa, Aug. 24, 1816, 7 Stat. 146, 2 Kappler 132, Art. 1.

[50] Treaty with the Shawnee, Nov. 7, 1825, 7 Stat. 284, 2 Kappler 262, Art. 1.

[51] Treaty with the Miami, Feb. 11, 1828, 7 Stat. 309, 2 Kappler 286, Art. 1; Treaty with the Winnebago, Aug. 1, 1829, 7 Stat. 323, 2 Kappler 300, Art. 1; Treaty with the Sioux, Aug. 5, 1851, 10 Stat. 954, 2 Kappler 591, Art. 2; Treaty with the Kalapuya, Jan. 22, 1855, 10 Stat. 1143, 2 Kappler 665, Art. 1; Treaty with the Wallawalla, June 9, 1855, 12 Stat. 945, 2 Kappler 694, Art. 1; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, 2 Kappler 714; Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707, 2 Kappler 865, Art. 1; Treaty with the Chippewa, Apr. 7, 1866, 14 Stat. 765, 2 Kappler 916, Art. 2.

right, title, interest and claim,"[52] or "all of their claims, right, title, and interest,"[53] or "all their right, title, interest, claim, and privilege."[54]

Uniformly in Indian treaties, by use of the word "claim," the parties have understood that the Indians conveyed something more than the release of a mere assertion of some undefined interest; for in such cases, the treaties speak of the "land herein conveyed." And despite the fact that a "claim" to land as conveyed to the United States, the Indians nevertheless frequently made reservations in the treaty of conveyance, where they were retaining some part of their old lands (instead of removing to new ones).[55] In such a situation we know of no case in which respondent has ever made the objection or a court has found that the reservation retained was not in fact owned. Indeed the present case, so far as counsel for petitioners have been able to determine, is the first case, in any situation, where it has been contended or held that the word "claim" in an Indian treaty does not connote the Indian right of use and occupancy.

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[52] Treaty with the Iowa, Aug. 4, 1824, 7 Stat. 231, 2 Kappler 208, Art. 1; Treaty with the Osage, June 2, 1825, 7 Stat. 240, 2 Kappler 217, Art. 1; Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871, 2 Kappler 561, Art. 4; Treaty with the Umpqua, Sept. 19, 1853, 10 Stat. 1027, 2 Kappler 606, Art. 1; Treaty with the Molala, Dec. 21, 1855, 12 Stat. 981, 2 Kappler 740, Art. 1; Treaty with the Rogue River Tribe, Sept. 10, 1853, 10 Stat. 1018, 2 Kappler 603, Art. 1.

[53] Treaty with the Utah-Tabeguache Band, Oct. 7, 1863, 13 Stat. 673, 2 Kappler 856, Art. 2, which as this Court said "must be viewed as giving the Band a country—limited by reservation boundaries—never before possessed by this Band." *Hayt* v. *United States*, 38 C. Cls. 455, 464.

[54] Treaty with the Winnebago, Oct. 13, 1846, 9 Stat. 878, 2 Kappler 565, Art. 2.

[55] See *e. g.*, Treaty with the Miami, Oct. 23, 1826, 7 Stat. 300, 2 Kappler 278; Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 2 Kappler 698, Art. 2; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957, 2 Kappler 702, Art. 2.